LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
SEP 5 1973
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1973.

No. 73-424

ELIZABETH J. RUSSELL, INDIVIDUALLY AND AS REPRESENTATIVE OF ALL CAPITAL INVESTMENT SERVICE CUSTOMERS,
*Petitioner,*

*vs.*

CONTINENTAL ILLINOIS NATIONAL BANK & TRUST COMPANY OF CHICAGO, A CORPORATION,
*Respondent.*

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.**

MAURICE JAMES MORIARTY,
ROBERT C. HULTQUIST,
JOSEPH M. LADD,
Suite 2400,
150 North Wacker Drive,
Chicago, Illinois 60606,
*Attorneys for Petitioner.*

Gunthorp-Warren Printing Company, Chicago • 346-1717

## INDEX.


PAGE

Opinion Below ..... 1

Jurisdiction ..... 2

Questions Presented ..... 2

Statutes Involved ..... 2

Statement of the Case ..... 3

Reasons for Granting the Writ ..... 9

I. The Court of Appeals Has Decided an Important Question of Federal Law Contrary to the Prior Decision of This Court in *Investment Company Institute* v. *Camp*, 401 U. S. 617, 91 S. Ct. 1091, 28 L. Ed. 367 (1971).

II. The Seventh Circuit Court of Appeals Has Imposed an Improper Restriction on the Rights of Private Parties to Sue Under the Glass-Steagall Banking Acts, §§ 16 and 21, 48 Stat. 184 and 189 (1933), 12 U. S. C. §§ 24 and 378.

Conclusion ..... 10

Appendices

A. Opinion of the Court of Appeals ..... A1

B. Order of the District Court ..... A8

C. Petitioner's Complaint ..... A10

Exhibit No. 1—Letter of 11/24/69 from Bank to Petitioner ..... A16

Exhibit No. 2—Letter of 5/29/70 from Bank to Petitioner ..... A18

Exhibit No. 3—Letter of Agreement Between Bank and Petitioner of 4/3/69 ..... A20

CITATIONS.

*Cases.*

Data Processing Services v. Camp, 397 U. S. 150, 90 S. Ct. 827, 25 L. Ed. 184 (1970) ..... 5

Investment Company Institute v. Camp, 401 U. S. 617, 91 S. Ct. 1091, 28 L. Ed. 2d 367 (1971) .....2, 4, 5, 7, 9

*United States Statutory Provisions.*

12 U. S. C. §§ 24 and 378 ..... 1-9

12 U. S. C. § 1813 ..... 8

28 U. S. C. § 1254 (1) ..... 2

28 U. S. C. § 1331 ..... 3

*Miscellaneous.*

10 Am. Jur. 2d Banks § 337 (1963) ..... 8

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1973.

---

No. .....

---

ELIZABETH J. RUSSELL, INDIVIDUALLY AND AS REPRESENTATIVE OF ALL CAPITAL INVESTMENT SERVICE CUSTOMERS,
*Petitioner,*

*vs.*

CONTINENTAL ILLINOIS NATIONAL BANK & TRUST COMPANY OF CHICAGO, A CORPORATION,
*Respondent.*

---

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

---

The petitioner, Elizabeth J. Russell, individually and as a representative of her class, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in this proceeding on June 7, 1973.

### OPINION BELOW.

The opinion of the court of appeals, filed on June 7, 1973, is not yet reported, but is reproduced in appendix A to this petition. This petition arises out of the dismissal of the petitioner's complaint by the district court on grounds that the petitioner had no standing to sue under §§ 16 and 21 of the Glass-Steagall

Act and the affirmance of that order by the seventh circuit based upon a conclusion that the petitioner, and those in her class, were not "depositors" entitled to the protection of the Glass-Steagall Act.

## JURISDICTION.

The jurisdiction of the Court rests on 28 U. S. C. § 1254(1).

## QUESTIONS PRESENTED.

1) Whether the opinion of the seventh circuit is contrary to this Court's opinion in *Investment Company Institute* v. *Camp*, 401 U. S. 617, 91 S. Ct. 1091, 28 L. Ed. 367 (1971).

2) Whether the petitioner, and those in her class, were entitled to the protection afforded by §§ 16 and 21 of the Glass-Steagall Banking Acts, 48 Stat. 184 and 189 (1933), 12 U. S. C. §§ 24 and 378.

3) Whether the respondent's Capital Investment Service was violative of §§ 16 and 21 of the Glass-Steagall Banking Acts.

## STATUTES INVOLVED.

United States Code, Title 12, § 24 (§ 16 of the Glass-Steagall Act as amended) provides in part:

> Seventh. "The business of dealing in securities and stock by [a national bank] shall be limited to purchasing and selling such securities and stock without recourse, solely upon the order, and for the account of, customers, and in no case for its own account . . . . Except as hereinafter provided or otherwise permitted by law, nothing herein contained shall authorize the purchase by [a national bank] for its own account of any shares of stock of any corporation." (Brackets supplied.)

United States Code, Title 12, § 378 (§ 21 of the Glass-Steagall Act as amended) provides in part:

(a) . . . It shall be unlawful—

(1) For any person, firm, corporation, association, business trust, or other similar organization, engaged in the business of issuing, underwriting, selling, or distributing, at wholesale or retail, or through syndicate participation, stocks, bonds, debentures, notes or other securities, to engage at the same time to any extent whatever, in the business of [deposit banking]. (Brackets supplied.)

## STATEMENT OF THE CASE.

This civil case was commenced as a class action. Petitioner's complaint was filed pursuant to Title 28, § 1331 of the United States Code. The petitioner, individually and as a representative of her class, sought the return of $7,500,000 invested by the class with the Continental Illinois National Bank & Trust Company of Chicago, the respondent (hereinafter called "the bank"). The complaint alleged that the bank had set up a fund designated as its "Capital Investment Service" (hereafter called the "fund"). The bank solicited contributions to its fund from the general public. In response to the bank's solicitations, the petitioner deposited $20,000 with the bank.

The agreements between the petitioner, those in her class, and the bank provided that the bank was to administer the funds collected on a completely discretionary basis. Petitioner's complaint, paragraph 4, emphasized the fact that the fund was administered by the bank on a completely discretionary basis rather than as a customary agency advisory account. The bank's answer to this paragraph denied those allegations. However, the bank's sworn response to interrogatory No. 4 acknowledged:

> Such accounts were (a) administered on a completely discretionary basis from the inception of Capital Investment Service (on or about July 9, 1968) until May 12, 1970 . . . .

The form agreement between the petitioner and the bank dated April 3, 1969, paragraphs 2 and 3, grants to the bank

complete discretion in the investment of the funds of the petitioner and those in her class. No other written agreement between the petitioner and the bank exists.

The petitioner's complaint in the court below seeks a return of the $7,500,000 invested in the fund plus interest and costs based upon the opinion of this Court on April 5, 1971, in *Investment Company Institute* v. *Camp*, 401 U. S. 617, 91 S. Ct. 1091, 28 L. Ed. 2d 367 (1971).

The bank filed its answer to the petitioner's complaint on May 21, 1971, and the petitioner commenced discovery. On July 30, 1971, prior to the completion of discovery, the bank filed its motion to dismiss which was granted by the trial court on January 6, 1972. In his oral ruling on the bank's motion to dismiss, the trial judge, Julius J. Hoffman, stated:

> The validity of the acts of a national bank under § 21 et sequitur of Title 12, United States Code, can only be questioned by the United States and not by private persons where the section imposes no penalty or forfeiture.

The seventh circuit acknowledged that petitioner would have standing to sue if she were a depositor or stockholder. However, as a participant in the fund, the seventh circuit concluded that petitioner had no standing to sue. It has been petitioner's contention that, as a participant in the bank's fund, she *is* a depositor of the bank. Petitioner's complaint alleged:

> 7. That the Plaintiff . . . *deposited* with the Continental Bank the sum of $20,000.00 on or about April 8, 1969.
>
> 8. That prior to and subsequent to April 8, 1969, other individuals, corporations, partnerships and joint ventures *deposited* with the defendant . . . a total of approximately Seven and One-Half Million Dollars ($7,500,000). (Emphasis supplied.)

This Court in its opinion in *Investment Company Institute* v. *Camp, supra,* did not hold on the one hand that general depositors of the bank were entitled to the protection afforded by

the Glass-Steagall Act while, on the other hand, special depositors to an investment fund created by the bank were somehow excluded from its protection.

Quite to the contrary, this Court recognized the intent of Congress to protect specifically the petitioner and those in her class as evidenced by the following statement contained in *Investment Company Institute* v. *Camp*, 401 U. S. at 631, 28 L. Ed. 2d at 378:

> Congress was also concerned that bank depositors might suffer losses *on investments that they purchased* in reliance on the relationship between the Bank and its affiliate. (Emphasis supplied.)

The true issue here is not whether the petitioner is a "depositor" or a member of a class that might suffer economic injury from the competition of the bank but rather whether the petitioner, and those in her class, are "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." (See *Investment Company Institute* v. *Camp*, 401 U. S. at 641, 28 L. Ed. 2d at 384 referring to this Court's opinion in *Data Processing Service* v. *Camp*, 397 U. S. 150, 90 S. Ct. 827, 25 L. Ed. 2d 184 (1970).

The petitioner's complaint alleged that the respondent bank, in the establishment of its fund, entered into the business of operating a mutual investment fund contrary to the Glass-Steagall Act. The complaint further alleged that the moneys deposited by the petitioner and those in her class (approximately $7,500,000.00) had suffered substantial losses due to the imprudent investments by the bank in various securities, principally the Penn Central Company. The complaint concluded with a prayer for judgment in the sum of $7,500,000.00 plus interest from the date of investment and costs. The complaint did not ask for damages by reason of the losses sustained which, at paragraph 18, were estimated at $2,000,000.00

The seventh circuit was apparently of the opinion that the bank's fund was an open-end mutual investment fund. At page 3 of the court's advance opinion, Circuit Judge Stevens wrote:

> The narrow issue, therefore, is whether participants in an *open-end mutual investment fund* are entitled to recover their losses *if* they can prove that operation of the fund violates §§ 16 and 21 of the Glass-Steagall Act. (Emphasis supplied.)

There is a contradiction in terms in the seventh circuit's statement framing the issues in this case. If the respondent's fund was in fact an open-end mutual investment fund, it was, prima facie, in violation of §§ 16 and 21 of the Glass-Steagall Act.

Again, at page 6 of the advance opinion of the seventh circuit, the court concluded with these comments:

> Indeed, to allow them to recover damages resulting from nothing more than a decline in value of a prudently managed fund *simply because the fund itself was created or operated in violation of §§ 16 and 21 of the Glass-Steagall Act* would impair the precise interests that the statute was enacted to protect. (Emphasis supplied.)

The opinion of the seventh circuit appears to accept the fact that the bank's fund was in fact an open-end mutual fund. However, the opinion does not follow nor apparently accept the reasoning of this Court's holding in *Investment Company Institute* v. *Camp, supra.* Indeed, the opinion of the seventh circuit concludes that participants in the bank's funds ". . . should benefit from a rule that would permit banks to enter that area of economic activity." The opinion completely overlooks and disregards the express prohibitions of the Glass-Steagall Act and the decision of this Court in *Investment Company Institute, supra,* which held that commercial banks may not enter into the investment banking field regardless of any benefits that might flow from the bank's activities.

The *Investment Company Institute* opinion reviewed the history of investment funds created and administered by national banks as follows:

> For at least a generation, therefore, there has been no reason to doubt that a national bank can, consistently with the banking laws, commingle trust funds on the one hand, and act as managing agent on the other. No provision of the banking law suggests that it is improper for a national bank to pool trust assets, or to act as a managing agent for individual customers, or to purchase stock for the account of its customers. But the union of these powers gives birth to an investment fund whose activities are of a different character. The differences between the investment fund that the Comptroller has authorized and a conventional open-end mutual fund are subtle at best, and it is undisputed that this bank investment fund finds itself in direct competition with the mutual fund industry. . . . . On their face, §§ 16 and 21 of the Glass-Steagall Act appear clearly to prohibit this activity by national banks. See 401 U. S. 624-625, 28 L. Ed. 2d 375.

The Court continued at 401 U. S. 629, 28 L. Ed. 2d 377:

> There is no dispute that one of the objectives of the Glass-Steagall Act was to prohibit commercial banks . . . from going into the investment banking business.

The Court concluded:

> Since Congress generally intended to divorce commercial banking from the kinds of activities in which bank security affiliates engaged, there is reason to believe that Congress explicitly intended to prohibit a national bank from operating an investment trust. See 401 U. S. 635, 28 L. Ed. 2d 381.

We turn now to the question of whether or not the Glass-Steagall Act, §§ 16 and 21, affords protection and provides relief to the petitioner, and those in her class, in this particular case. The seventh circuit, at page 4 of its opinion, stated:

> Although the Bank argues vigorously to the contrary, we may assume also that the interests of depositors or stockholders of the Bank may be sufficient to support a similar action.

It is the contention of the petitioner that she was a general depositor of the bank (an affidavit by Mrs. Russell to this effect was filed in opposition to the bank's motion to dismiss) as well as a special depositor in the bank's fund to the extent of $20,000 (paragraph 7, petitioner's complaint).

§ 1813 contains the only definitions under Title 12. This section is part of the Federal Deposit Insurance Corporation Act. Section 1813(*l*) provides:

> (*l*) The term "deposit" means
>
> (1) the unpaid balance of money or its equivalent received by a bank in the usual course of business and for which it has given or is obligated to give credit to a commercial, checking, savings, time, or thrift account, or which is evidenced by a certificate of deposit . . . and . . .
>
> (2) trust funds as defined in this chapter received or held by such bank, whether held in the trust department or held or deposited in any other department of such bank, . . . .

Section 1813(p) concludes:

> (p) The term "trust funds" means funds held by an insured bank in a fiduciary capacity and includes, without being limited to, funds held as trustee, executor, administrator, guardian or agent.

Neither § 24 nor § 378 of Title 12 provides a definition of "depositor" or what is a "deposit." There can be no question but that the plaintiff, and those in her class, were special depositors to the extent of $7,500,000.00 in the respondent's fund The Glass-Steagall Act does not differentiate between special and general depositors.

American Jurisprudence 2nd, Vol. 10, under the subject of Banks, at § 337 states:

> The term "deposit," when used in connection with a banking transaction, denotes a contractual relationship ensuing from the delivery, by one known as the "depositor," of moneys, funds, or things into the possession of the bank, which receives the same upon the agreement to pay, repay, or return, upon the order or demand of the depositor, the moneys, funds, or equivalent amount, or things, received; . . . .

By any definition, the petitioner, and those in her class, were depositors of the bank. Whether the petitioner and those in her class were in fact general or special depositors makes no practical difference. If the petitioner, and those in her class, were general depositors, they would have a cause of action against the bank for $7,500,000.00 based upon a debtor-creditor relationship. As special depositors, the petitioner, and those in her class, are entitled to receive back the $7,500,000.00 deposited with the bank by reason of a bailment, agency or trust.

## REASONS FOR GRANTING THE WRIT.

Two important reasons exist for the granting of this petition. First, the decision of the seventh circuit, while impliedly acknowledging that the bank's fund was an open-end mutual investment fund, questioned whether such a fund would in fact be violative of the Glass-Steagall Act. This Court has expressly so found in its decision in *Investment Company Institute* v. *Camp, supra.*

Secondly, the question of which individuals, or groups of individuals, are entitled to the protection of the provisions of the Glass-Steagall Act is of major significance. This Court, in *Investment Company Institute, supra,* decided that two private groups, one incorporated and the other not, had standing to sue under the Glass-Steagall Act. This Court concluded that Congress had arguably legislated against the competition between the banking business and the investment banking industry. In the case at bar, the very class directly injured by the activities of the respondent were denied standing to sue.

## CONCLUSION.

**For the reasons indicated, this petition for writ of certiorari should be granted.**

Respectfully submitted,

MAURICE JAMES MORIARTY,
ROBERT C. HULTQUIST,
JOSEPH M. LADD,
Suite 2400,
150 North Wacker Drive,
Chicago, Illinois 60606,
*Attorneys for Petitioner.*

## APPENDIX A.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

September Term, 1972 — January Session, 1973

No. 72-1185

ELIZABETH J. RUSSELL, individually and as representative of all Capital Investment Service customers,

*Plaintiff-Appellant,*

*vs.*

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, a National Banking Association,

*Defendant-Appellee.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 71-C-977

JULIUS J. HOFFMAN, *Judge.*

Argued February 23, 1973—Decided June 7, 1973

Before SWYGERT, *Chief Judge,* and PELL and STEVENS, *Circuit Judges.*

STEVENS, *Circuit Judge.* Plaintiff's complaint alleges that, in response to the Bank's solicitations, she and other members of the public each invested at least $20,000 in an "open-end mutual fund" established by the Bank; that the aggregate amount of approximately $7,500,000 invested by similary situated participants "placed the defendant in the business of

operating a mutual investment fund contrary to and in violation of §§ 16 and 21 of the Glass-Steagall Act;"[1] and that a large purchase of the common stock of Penn Central Company, which was both an obligor and depositor of the Bank, resulted in a substantial loss to the fund. Suing on behalf of all participants in the fund, she prays for a judgment of $7,500,000 plus interest and costs.[2] The question presented by her appeal is whether the district court properly dismissed the complaint on the ground that she does not have standing to maintain an action for damages for violation of §§ 16 and 21 of that Act.[3] We affirm.

We first put to one side certain questions which we do not decide. There are references in the record[4] to the fact that

1. The quotations are from plaintiff's complaint.

2. The prayer of the complaint reads: "Wherefore, plaintiff, Elizabeth J. Russell, individually and on behalf of all those who have made capital contributions to the Capital Investment Service at the Continental Bank, prays judgment against the defendant in the sum of Seven Million Five Hundred Thousand Dollars ($7,500,000.00) plus interest from the date of investment and costs of this suit."

3. The relevant portions of those sections of the Glass-Steagall Act provide:

> "Seventh. The business of dealing in securities and stock [by a national bank] shall be limited to purchasing and selling such securities and stock without recourse, solely upon the order, and for the account of, customers, and in no case for its own account. . . .
>
> ". . . Except as hereinafter provided or otherwise permitted by law, nothing herein contained shall authorize the purchase by [a national bank] for its own account of any shares of stock of any corporation." 12 U. S. C. § 24.
>
> "[I]t shall be unlawful . . . [f]or any person, firm, corporation, association, business trust, or other similar organization, engaged in the business of issuing, underwriting, selling, or distributing, at wholesale or retail, or through syndicate participation, stocks, bonds, debentures, notes, or other securities, to engage at the same time to any extent whatever, in the business of [deposit banking]." 12 U. S. C. § 378.

4. Before the district court dismissed the complaint, the parties engaged in discovery. Although facts developed by that discovery are in the record before us, we do not consider them in connection with our ruling on the sufficiency of the complaint.

plaintiff is a depositor in the Bank as well as a participant in the fund. Quite clearly the attempt by a fund participant to surcharge the Bank in the amount of any decrease in the net assets of the fund presents an issue with respect to which the interests of Bank depositors are in square conflict with those of fund participants. Whether that conflict would disqualify plaintiff as an adequate representative of the class described in the complaint is one question we need not decide because the complaint itself refers only to plaintiff's status as a participant. For the same reason our ruling on the sufficiency of her pleading does not determine the standing of a bank's depositors to litigate questions arising out of alleged violations of the Glass-Steagall Act.

Nor do we comment on the validity of the Bank's arguments that the dismissal should be sustained on the alternate grounds (1) that the required jurisdictional amount has not been alleged, since plaintiff does not claim an individual loss of over $10,000, or (2) that in any event the facts do not disclose a violation of Glass-Steagall.[5] Finally, we note that plaintiff has expressly disavowed any theory of recovery except her claim that §§ 16 and 21 of the Glass-Seagall Act have been violated.[6] The violation, if it occurred, is a consequence of the relationship between the Bank and the participants in the fund. If their interests are "securities" within the meaning of the Act, the violation exists no matter how prudently or profitably the fund assets may have been managed; conversely, if their interests

5. In *Investment Co. Institute* v. *Camp*, 401 U. S. 617, the Supreme Court held that the sale of interests in the type of fund established by First National City Bank was a sale of "securities" condemned by §§ 16 and 21. We do not decide whether plaintiff's investment of $20,000 with the defendant Bank was a comparable purchase of a "security," or whether, as the Bank argues, our decision in *Milnarik* v. *M-S Commodities, Inc.*, 457 F. 2d 274 (7th Cir. 1972), is relevant to this issue.

6. Brief for plaintiff-appellant, page 11. In her memorandum opposing the motion to dismiss, plaintiff conceded that "the Complaint was not intended to assert any claim except one based on violation of Sections 16 and 21 of the Glass-Steagall Act."

are not themselves securities, the mere fact that the Bank may have acted negligently or even improperly in its use of the plaintiff's funds to invest in Penn Central stock is completely irrevelant. This is not a mismanagement case. The narrow issue, therefore, is whether participants in an open-end mutual investment fund are entitled to recover their losses if they can prove that operation of the fund violates §§ 16 and 21 of the Glass-Steagall Act.

There is no express statutory authorization for private action to redress a violation of Glass-Steagall. Of course, the absence of an express private remedy does not necessarily resolve the issue. For in certain situations the Supreme Court has found or created an implied remedy in favor of private parties within the class, or classes, of persons intended to be protected by a statute.

Thus, in *Texas & Pacific Ry.* v. *Rigsby*, 241 U. S. 33, the Court found an implied damage remedy because the plaintiff employee was a member of the class "for whose especial benefit" the Federal Safety Appliance Act had been passed. It stated:

> "A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied, according to a doctrine of the common law expressed in 1 Com. Dig., *tit.* Action upon Statute (F), in these words: 'So, in every case, where a statute enacts, or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law.' " 241 U. S. at 39.

In *J. I. Case* v. *Borak*, the Court held that unless relief were implied for "victims of deceptive proxy statements . . . the whole purpose of [§ 14(a) of the Securities Exchange Act of 1934] might be frustrated." 377 U. S. 426, 434-435. See also

*Tunstall* v. *Brotherhood*, 323 U. S. 210; *Allen* v. *State Board of Elections*, 393 U. S. 544, 554-557. *Cf. Reitmeister* v. *Reitmeister*, 162 F. 2d 691, 694 (2d Cir. 1947).

In *Investment Co. Institute* v. *Camp*. 401 U. S. 617, following its holding in *Data Processing* v. *Camp*, 397 U. S. 150, the Court held that companies engaged in the business of operating mutual investment funds had standing to attack portions of a regulation issued by the Comptroller of Currency which permitted national banks to become competitors of the plaintiffs. Although the Bank argues vigorously to the contrary, we may assume also that the interests of depositors or stockholders of the Bank may be sufficient to support a similar action.

In light of the analysis of the legislation and its history in the *Camp* opinion, however, our understanding of the interests at stake leads to the conclusion that the position of a fund participant seeking to recover damages from the Bank is quite different.

Because of its expertise in the money market, a bank may desire to enter allied lines of activity which involve greater profit potential and greater risk than traditional commercial banking. Federal banking laws, although permitting some such allied activities,[7] severely limit and regulate the kinds of risks a national bank may take.

The basic reason for the legislation does not reflect a concern that the bank will be less capable of performing the activity efficiently than other entrepreneurs; rather, it reflects a desire to minimize the risks of loss or insolvency to the bank itself.[8] In short, the prohibition of an activity such as operation

7. "No provision of the banking law suggests that it is improper for a national bank to pool trust assets, or to act as a managing agent for individul customers, or to purchase stock for the account of its customers. But the union of these powers gives birth to an investment fund whose activities are of a different character." *Investment Co. Institute* v. *Camp*, 401 U. S. 617, 624-625.

8. "The Glass-Steagall Act reflected a determination that policies of competition, convenience, or expertise which might otherwise

of a common trust fund is not based on any assumption that participants in such funds need protection from bank entry into this market; rather, it rests on the belief that the higher entrepreneurial risks associated with this activity[9] might jeopardize the overriding interests of depositors and the public in maintaining the solvency of banks and confidence in the banking system.[10]

If we assume as a general proposition that banks are at least as competent as other firms to operate mutual investment funds, it is manifest that participants in such funds would not be injured and, indeed, should benefit from a rule that would permit banks to enter that area of economic activity.[11] Participants,

---

support the entry of commercial banks into the investment banking business were outweighed by the 'hazards' and 'financial dangers' that arise when commercial banks engage in the activities proscribed by the Act." *Id.* at 630.

9. "It is not the slightest reflection on the integrity of the mutual fund industry to say that the traditions of that industry are not necessarily the conservative traditions of commercial banking. The needs and interests of a mutual fund enterprise more nearly approximate those of securities underwriting, the activity in which bank security affiliates were primarily engaged. When a bank puts itself in competition with mutual funds, the bank must make an accommodation to the kind of ground rules that Congress firmly concluded could not be prudently mixed with the business of commercial banking." *Id.* at 637.

Earlier in its opinion the Court noted: "Senator Glass made it plain that it was 'the fixed purpose of congress' not to see the facilities of commercial banking diverted into speculative operations by the aggressive and promotional character of the investment banking business." *Id.* at 632.

10. The Glass-Steagall Act was enacted "[t]o provide for the safer and more effective use of the assets of banks, [and] to prevent the undue diversion of funds into speculative operations; . . . ." 48 Stat. 162. "There is no dispute that one of the objectives of the Glass-Steagall Act was to prohibit commercial banks, banks that receive deposits subject to repayment, lend money, discount and negotiate promissory notes and the like, from going into the investment banking business." 401 U. S. at 629.

11. "From the perspective of competition, convenience, and expertise, there are arguments to be made in support of allowing commercial banks to enter the investment banking business. But Con-

therefore are not members of "the class for whose especial benefit the statute was enacted." Indeed, to allow them to recover damages resulting from nothing more than a decline in value of a prudently managed fund simply because the fund itself was created or operated in violation of §§ 16 and 21 of the Glass-Steagall Act would impair the precise interests that the statute was enacted to protect.[12]

In our opinion, a fair evaluation of "the congressional policy underpinning the substantive provisions of the statute"[13] requires rejection of the implied damage remedy plaintiff seeks to assert in this case. The judgment is

AFFIRMED.

---

gress determined that the hazards outlined above made it necessary to prohibit this activity to commercial banks. Those same hazards are clearly present when a bank undertakes to operate an investment fund." *Id.* at 636.

12. The Supreme Court's holding in *Thompson* v. *St. Nicholas National Bank*, 146 U. S. 240, 251, apparently rested in part on its agreement with the New York Court of Appeals "that it would defeat the very policy of an act intended to promote the security and strength of the national banking system, if its provisions should be so construed as to inflict a loss upon the banks and a consequent impairment of their financial responsibility."

13. See *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U. S. 388, 403 (Mr. Justice Harlan concurring).

## APPENDIX B.

IN THE UNITED STATES DISTRICT COURT
for the Northern District of Illinois
Eastern Division

| | |
|---|---|
| ELIZABETH J. RUSSELL, *Plaintiff,* *vs.* CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, *Defendant.* | No. 71 C 977 |

ORDER.

This matter coming on to be heard on the motion of defendant Continental Illinois National Bank and Trust Company of Chicago to dismiss the complaint, and the Court having reviewed the memoranda filed by the parties and being duly advised in the premises,

IT IS HEREBY ORDERED that said motion to dismiss is granted, and the complaint herein is dismissed.

/s/ JULIUS J. HOFFMAN,
*United States District Judge.*

Dated: January 6, 1972.

## CERTIFICATE OF SERVICE.

The undersigned hereby certifies that on January 7, 1972, he served a copy of the foregoing Notice and Order attached thereto upon Maurice J. Moriarty, Esq., Robert C. Hultquist, Esq., Donald M. Rose, Esq., and Joseph M. Ladd, Esq., 150 N. Wacker Drive, Suite 2400, Chicago, Illinois 60606, attorneys for plaintiff herein, by delivering said copy to said attorneys in accordance with the requirements of Rule 5(b) of the Federal Rules of Civil Procedure.

/s/ LEE N. ABRAMS
Lee N. Abrams

## APPENDIX C.

IN THE DISTRICT COURT OF THE UNITED STATES
Northern District of Illinois
Eastern Division

ELIZABETH J. RUSSELL, individually and as Representative of all Capital Investment Service Customers,
*Plaintiff,*
*vs.*
CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, a Corporation,
*Defendant.*

No. 71 C 977
Class Action
Judge Hoffman

### COMPLAINT.

Comes now the plaintiff, Elizabeth J. Russell, individually and as Representative of all Capital Investment Service Customers of the Continental Illinois National Bank and Trust Company of Chicago, by and through her attorneys, Maurice James Moriarty, Donald M. Rose and Robert C. Hultquist and, complaining of the defendant, Continental Illinois National Bank and Trust Co. of Chicago, a national banking institution and a wholly owned subsidiary of Conill Corp., states as follows:

1. That on or about April 8, 1969, and for a long time prior thereto, the defendant, Continental Illinois National Bank and Trust Company of Chicago (hereinafter called "Continental Bank") was and is a national banking institution with its principal place of business in the City of Chicago, County of Cook and State of Illinois.

2. That subsequent to April 8, 1969, the Continental Bank formed a holding company and is now operating as a wholly owned subsidiary of the Conill Corp.

3. During the years 1968 and 1969 the defendant, Continental Bank, commenced an advertising campaign to solicit funds from the general public in order to establish within said banking institution a collective investment fund.

4. That the Continental Bank solicited from the general public minimum investments of Twenty Thousand Dollars ($20,000.00) per account for an open-end mutual investment fund. All investments made by the Continental Bank were completely at the discretion of the defendant and were not the customary advisory accounts established by bank and trust companies for agency investment funds.

5. That the funds solicited and collected by the Continental Bank placed the defendant in the business of operating a mutual investment fund contrary to and in violation of Sections 16 and 21 of the Glass-Steagell Act, 12 U. S. C., § 24 and 378.

6. This Court has jurisdiction of this matter pursuant to Title 28, Section 1331 of the United States Code.

7. That the plaintiff, Elizabeth J. Russell, a housewife residing in the City of Chicago, County of Cook and State of Illinois, in response to the solicitations of the defendant published in the Wall Street Journal, the Chicago Tribune, Time Magazine and other publications of general circulation in the Chicago area and in and by means of publications carried on in interstate commerce, deposited with the Continental Bank the sum of Twenty Thousand Dollars ($20,000.00) on or about April 8, 1969.

8. That prior to and subsequent to April 8, 1969, other individuals, corporations, partnerships and joint ventures deposited with the defendant, as a direct consequence of the defendant's public solicitations, a total of approximately Seven and One-Half Million Dollars ($7,500,000.00). The plaintiff

brings this action on her own behalf as well as on behalf of all those similarly situated.

9. That the defendant referred collectively to the funds solicited from the public as the Capital Investment Service. Said funds were administered by the Continental Bank's Trust Department on a completely discretionary basis.

10. The Continental Bank commingled and pooled the funds deposited by the plaintiff and others and commenced the purchase of large blocks of stock. The defendant allocated shares of stock to the accounts of the various customers of said defendant.

11. As part of the investment portfolio of its Capital Investment Fund, the Continental Bank purchased approximately One Million Dollars ($1,000,000.00) of the common stock of the Penn Central Company, forty-five (45) shares of which were allocated to the account of the plaintiff at a cost of Fifty-Four and 77/100 Dollars ($54.77) per share for a total of Two Thousand Four Hundred Sixty-Four and 81/100 Dollars ($2,464.81).

12. That during the aforesaid dates, the Penn Central Company was indebted to the Continental Bank to the approximate sum of Twenty-Three Million Dollars ($23,000,000.00). The Penn Central Company also had on deposit with the defendant approximately Four Million Dollars ($4,000,000.00). The defendant held in its own name, street name or in the name of its customers over Five Hundred Thousand (500,000) shares of the common stock of the Penn Central Company.

13. That the defendant knew, or by the exercise of reasonably prudent investment judgment should have known, that the common stock of the Penn Central Company was a highly speculative investment. The investment by the Continental Bank in the Penn Central Company common stock as well as other common stocks purchased by the defendant for the Capital Investment Service customers was at the sole discretion of the de-

fendant and was made without the consent or approval of the customers of the defendant.

14. That the activities of the Continental Bank, as aforesaid, placed the defendant in a position of substantial conflict as a national banking institution on the one hand and as an investment banking mutual fund on the other. These activities of the Continental Bank were in clear violation of the Glass-Steagell Act and involved evils which Congress sought to prevent in the enactment of said Act.

15. That on or about November 24, 1969, the defendant reported to its Capital Investment Service customers the status of its investments with particular emphasis on the investment in the common stock of the Penn Central Company. The defendant commented upon the meetings by the personnel of the Continental Bank with the top management of the Penn Central Company and called the investors' attention to the fact that a meeting had taken place between the defendant bank and a Mr. Paul Gorman who was to assume the office of President of Penn Central on December 1, 1969. In summarizing the position of the Penn Central investment, the letter from the Continental Bank dated November 24, 1969, a copy of which is attached hereto and marked Exhibit No. 1 concluded as follows:

> The prospects for the company (meaning Penn Central) two to three years out look extremely favorable. Our timing on the original purchases of this stock was poor, but we believe it would be an error to sell it now.

16. In its letter of May 29, 1970, to the plaintiff and other customers of the Capital Investment Service, the Continental Bank advised against any changes in the Capital Investment portfolio and specifically against the selling of these securities at a loss. A copy of said letter is attached hereto and marked Plaintiff's Exhibit No. 2.

17. That on or about June 22, 1970, the defendant sold out the Penn Central Company stock held in the plaintiff's

account at a price of Seven and 50/100 Dollars ($7.50) per share. Said stock had been acquired by the Continental Bank on or about April 11, 1969, at a cost of 54⅛ per share. The investment by Continental Bank in the Penn Central Company common stock had declined in a period of fourteen (14) months to approximately Fourteen Per Cent (14%) of the original cost.

18. That the investment by the Continental Bank for the customers of its Capital Investment Service have declined in value by approximately Two Million Dollars ($2,000,000.00).

19. That on June 12, 1970, the defendant sold One Hundred Eight Thousand Nine Hundred and Fifty (108,950) shares of the Penn Central stock, approximately Thirty-Two Per Cent (32%) of the total shares sold on all the exchanges that day. From June 12 through June 19, 1970, the defendant sold a total of Two Hundred Ninety Thousand Nine Hundred and Fifty (290,950) shares of the Penn Central stock.

20. On June 12, 1970, a memorandum was circulated from the Stock Selection Committee of the Continental Bank to the Trust Investment Division of said bank recommending the sale of the Penn Central stock held by Continental Bank in all accounts.

21. The Continental Bank commenced the public solicitation for its Capital Investment Service account without a valid underwriting in reliance upon an illegal and void order of the Securities and Exchange Commission exempting certain banks from the provisions of the Investment Company Act of 1940. Said defendant also relied upon an illegal and void Regulation No. 9 of the Comptroller of The Currency.

22. On April 5, 1971, the United States Supreme Court in the matter of *Investment Company Institute* v. *Walter B. Camp, Comptroller of The Currency* and *National Association of Securities Dealers* v. *Securities and Exchange Commission*, .... U. S. ...., .... L. Ed. 2d ...., S. Ct. ...., decided

that the activities of national banking institutions in the investment banking field constituted the bank as an underwriter, issuing, selling and distributing securities in violation of Sections 16 and 21 of the Glass-Steagell Act.

23. The numbers of customers of the Capital Investment Service and their names and addresses are unknown to this plaintiff but, on information and belief, they are so numerous that it is impracticable to bring them all before this Court.

24. There are questions of law and fact presented herein which are common to the entire class of persons who are customers of the Continental Bank Capital Investment Service, that the claim of this plaintiff is typical of the claims of all members of the class; that the plaintiff will fairly and adequately protect the interest of said class.

WHEREFORE, plaintiff, Elizabeth J. Russell, individually and on behalf of all those who have made capital contributions to the Capital Investment Service at the Continental Bank, prays judgment against the defendant in the sum of Seven Million Five Hundred Thousand Dollars ($7,500,000.00) plus interest from the date of investment and costs of this suit.

ELIZABETH J. RUSSELL, individually and on behalf of the Continental Illinois National Bank and Trust Company Investment Service Customers, *Plaintiff*

By .....

*Their Attorneys*

MAURICE JAMES MORIARTY
DONALD M. ROSE
ROBERT C. HULTQUIST
150 N. Wacker Drive—Suite 2400
Chicago, Illinois 60606
368-4500

**EXHIBIT NO. 1**

CONTINENTAL ILLINOIS NATIONAL BANK
AND TRUST COMPANY OF CHICAGO
231 South LaSalle Street Chicago, Illinois 60690

November 24, 1969

Trust Department

Mrs. Elizabeth J. Russell
10549 South Artesian Street
Chicago, Illinois 60655

Dear Mrs. Russell:

There is considerable evidence of a slackening in the pace of economic activity, and we expect this trend to continue through year-end and into 1970. Recent statistics on retail sales, consumer buying intentions, employment, and personal income indicate a slowing trend. Business investment, which was strong in the first half of 1969, is also showing signs of slowing. Our forecasts indicate that capital spending by business and defense spending by the Federal Government will be less stimulative on the economy in 1970.

In attempting to retard inflation, monetary authorities have maintained a restrictive policy. As this policy is pursued, it may be expected to have an increasingly negative impact on corporate earnings, probably through the middle of 1970. However, common stock prices often look beyond currently reported earnings, and tend to anticipate future levels of corporate profits.

At present the stock market is substantially below 1968 year-end levels. In recent weeks we have been encouraged by its ability to hold above lows reached in the summer. The near term tone of the market will largely be influenced by the measure of progress on a Viet Nam settlement and the degree of monetary restraint applied by Federal Reserve authorities.

On balance we believe the stocks in the Capital Investment Service Program are well situated to participate in the next market advance. One issue, Penn Central, has performed extremely poorly to date, and has been a major disappointment to us. At the time we purchased this stock we regarded it favorably for anticipated merger savings, a substantial tax shelter and great potential as the country's largest real estate company. Our error (shared by the company's management) was in seriously underestimating the difficulties of merging the two railroad operations into a single, efficient transportation system. While the non-rail segments of Penn Central have more than met our expectations, their excellent performance has not been able to overcome the drain of the unexpectedly large rail losses. Recent weakness in the stock may be attributed to investor concern over the possibility of a dividend cut when the Board of Directors meet November 26. Consolidated per share earnings for the first nine months were a disappointing $.73 versus $2.26 a year ago. Due to the non-recurring nature of real estate sales, it is difficult to estimate earnings for Penn Central, but a decline from 1968 seems unavoidable. Some current weakness may also stem from tax loss selling in the stock. We have met several times during the year with top management, and, just last week, had an initial meeting with Mr. Paul Gorman who is taking office as President on December 1.

We believe that management has now identified all of its problems and has begun programs which should solve them—though not overnight. The prospects for the company two to three years out look extremely favorable. Our timing on the original purchases of this stock was poor, but we believe it would be an error to sell it now.

Sincerely,

/s/ Lynwood J. Larson
Lynwood J. Larson
*Trust Officer*

LJL:LK
Enclosure

**EXHIBIT NO. 2.**

CONTINENTAL BANK

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO

231 South LaSalle Street
Chicago, Illinois 60690

Trust Department

May 29, 1970

Dear Capital Investment Service Customer:

Earlier this month you received our letter advising that we have made a change in the procedure for administering Continental's Capital Investment Service accounts. As a result, the accounts will no longer be on a discretionary basis, but we will administer them on an advisory (consult) basis. If you have not as yet replied to our letter, we would appreciate your so doing as soon as possible.

During the past 17 months and particularly recent weeks, stock prices have declined significantly. In terms of both duration and magnitude, the decline is more severe than others in recent history. The current investment environment is unique in that a combination of negative factors is contributing to the weakness; they include a rapidly rising price level, monetary restraint which hopefully will slow inflation, record high interest rates, a slowing economy, the military conflict in Asia and some social unrest. Perhaps the strongest impact on stock prices derives from lower corporate earnings, the investment alternative offered to stock investors by record high bond yields and the modest recovery in the economy expected over the next several quarters.

Our forecast of business conditions indicates that there will be no increase in gross national product in the year 1970 versus

1969 after adjusting for the inflation factor. Corporate profits in 1970 will probably be down 10% on an annual basis from the preceeding year. We expect the mild business slowdown which we are now experiencing to show improvement by year-end. Although 1971 should bring increases in business activity the rate of growth will likely be less than at our full employment potential. Longer term we are more optimistic and would expect recovery on a broader front by 1972.

In view of the extremely depressed level of stock prices in general and the issues in the portfolio in relation to what we believe to be their inherent value, we are of the opinion that better results will be accomplished by deferring on portfolio changes until selling pressures recede and some measure of stability in the overall market is achieved. We will watch the issues in your account closely and call to your attention any changes we think would be constructive.

Sincerely,

/s/ Richard L. Merrick
Richard L. Merrick
*Second Vice President*

RLM:RM

Enclosure: Investment Review

**EXHIBIT NO. 3.**

**(Form for individuals)**

**Trust Department**

**Continental Illinois National Bank**
**and Trust Company of Chicago**
**231 South LaSalle Street**
**Chicago, Illinois 60690**

**Re: *Continental's Capital Investment Service***

**Gentlemen:**

I have executed and delivered to you a form for the opening of a securities account at Merrill Lynch, Pierce, Fenner & Smith, Inc. and a limited power of attorney appointing you my agent with full discretion to manage my account. I have delivered or will deliver to you for transfer to Merrill Lynch funds and/or certificates belonging to me which are to be used in establishing my account. You are hereby retained as my agent and requested to handle my account under your Capital Investment Service, upon the following terms and conditions:

*Investment Policy.*

1. My investment objective is (check one):

☒ long-term capital growth, without consideration for current income.

☐ optimal current return through secure income from dividends, with reasonable potential market appreciation.

2. You will invest my account in a limited number of securities which from time to time are selected by you as the standard portfolio for Continental's Capital Investment Service accounts having the investment objective I have indicated.

3. You will buy or sell securities for my account in accordance with your investment decisions for all Capital Investment Service accounts having my investment objective without regard for federal tax or other individual circumstances of myself or other individual account holders.

4. If I am opening my account entirely or in part with securities instead of cash, you will sell these securities as soon as you determine in your discretion to do so (without obligation on your part to consider federal tax or other individual circumstances of myself) and will reinvest the proceeds in the securities in the standard Capital Investment Service portfolio for accounts having my investment objective.

5. Unless you receive contrary written notice from me herewith or at a later date, you are instructed to reinvest in your discretion all dividend and interest income received upon securities in my account.

*Relationship With Merrill Lynch.*

6. In the management of my account, you will rely upon duplicate confirmation of transactions and monthly statements of account to be furnished by Merrill Lynch which will act as custodian of all securities and cash in my account.

7. I understand that Merrill Lynch will charge brokerage fees on all transactions for my account at the standard rates for transactions of such size.

8. During the term of this agreement, you will have the sole power to instruct Merrill Lynch concerning the investment of my account, and I will not instruct them regarding such investment.

9. You shall not be liable for any act or omission of Merrill Lynch.

*Fee For Services.*

10. You will receive from me an annual fee payable in advance on May 15 and November 15 of each year, at the rate of ¾ of 1% of the value of my account, with a minimum annual fee of $200.

11. The initial fee covering the period from the date hereof to (May or November) 15 is to be $28.65 and will be deducted by you from the funds which I have delivered or will deliver to you for use in establishing my account, or in the event such funds are insufficient because I am establishing my account solely or in part with securities, the additional amount due will be paid to you by Merrill Lynch out of the proceeds from the sale of such securities.

12. The fee for subsequent six month periods shall be calculated and paid in advance on May 15 and on November 15 on the basis of the total value of my account on each such date (that is, the total of cash in my account plus securities valued at their closing market prices on such date or the last preceding date on which the New York Stock Exchange is open for trading).

13. The fee shall be charged to my account and paid to you by Merrill Lynch upon presentation of your statement, or in the event that cash in my account is insufficient to cover the entire fee, you shall bill me directly for the amount of the deficiency or, in your discretion, for the entire fee, and I will pay you promptly.

14. In the event I contribute additional funds and/or securities to my account, an initial fee for such additional investment shall be calculated and payable in the manner described in paragraph 11 above, except that no additional fee shall be payable if ¾ of 1% of the value of my account including such additional investment is not more than $200.

*Representation and Warranty*

15. I understand that your services as agent for Capital Investment Service accounts are available only to residents of the State of Illinois, and I warrant and represent to you that I am a resident of the State of Illinois, acting solely on my own behalf in connection with this account.

16. I agree to notify you immediately in the event that I should cease to be a resident of the State of Illinois or in the event that I should in any manner transfer my account or any part thereof or interest therein to any other person.

*Termination.*

17. It is agreed that this agreement will terminate upon your obtaining knowledge that I have ceased to be a resident of the State of Illinois, that my account or any part thereof or interest therein has been acquired during my lifetime in any manner (including judicial appointment of a conservator or guardian in the event of my mental incapacity) by any person other than myself, or that I have died.

18. In addition to termination as described in paragraph 17 above, this agreement may be terminated by either of us at any time upon written notice which shall be effective when received by the other party and Merrill Lynch.

19. In the event of termination pursuant to paragraph 17 (except termination upon my death or mental incapacity) or if this agreement is terminated by me pursuant to paragraph 18, fees paid in advance shall not be refunded.

20. Upon termination of this agreement, Merrill Lynch will continue to hold the securities and cash in the account which I have established with them, but all of your rights and obligations as agent for the investment of the account shall terminate.

*Your Liability.*

21. You assume no responsibility under this agreement other than to render the services called for hereunder in good faith

and you shall not be liable for anything done or omitted to be done by you so long as you shall have acted in good faith.

Very truly yours,

Signature /s/ ELIZABETH J. RUSSELL

Name (Please print): Elizabeth J. Russell

Address: 10549 So. Artesian Ave.

City: Chicago State: Illinois Zip Code: 60655

Accepted:

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO

By /s/ (illegible)

*Vice President*

Attest: /s/ PAUL F. RAMSEY

*Assistant Secretary*

Date: 3 April, 1969

LIBRARY
SUPREME COURT, U. S.

No. 73-424

FILED
OCT 1 1973
MICHAEL RODAK, JR., CLERK

# In the Supreme Court of the United States

---

**ELIZABETH J. RUSSELL, individually and as representative of All Capital Investment Service customers,**

*Petitioner,*

vs.

**CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, a corporation,**

*Respondent.*

---

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

---

## BRIEF IN OPPOSITION

---

ROBERT L. STERN
BRYSON P. BURNHAM
231 South La Salle Street
Chicago, Illinois 60604
*Attorneys for Respondent*

MAYER, BROWN AND PLATT,
231 South La Salle Street
Chicago, Illinois, 60604
*Of Counsel*

SORG/CHICAGO U.S.A.

## INDEX


| | PAGE |
|---|---|
| Questions Presented | 1 |
| Statutes Involved | 2 |
| Statement of the Case | 2 |
| Argument | 6 |
| Conclusion | 10 |


## TABLE OF CASES


| | |
|---|---|
| Arnold Tours v. Camp, 400 U.S. 45 (1970) | 8 |
| Blaney v. Florida National Bank at Orlando, 357 F. 2d 27 (5th Cir. 1966) | 7 |
| Data Processing Service v. Camp, 397 U.S. 150 (1970) | 7, 8 |
| Investment Company Institute v. Camp, 401 U.S. 617 (1971) | 4, 7, 8, 9 |
| Noel Estate, Inc. v. Commercial National Bank in Shreveport, 232 F. 2d 483 (5th Cir. 1956) | 7 |
| Sierra Club v. Morton, 405 U.S. 727 (1962) | 7 |
| Snyder v. Harris, 394 U.S. 332 (1969) | 10 |
| Texas & Pacific Ry. Co. v. Rigsby, 241 U.S. 33 (1916) | 6 |
| Thompson v. St. Nicholas National Bank, 146 U.S. 240 (1892) | 7 |
| United States v. Students Challenging Regulatory Agency Procedures, 93 S.Ct. 2405 (1973) | 6-7 |
| Zahn v. International Paper Co., cert. granted, 410 U.S. 925 (1973) | 9 |

# In the Supreme Court of the United States

## No. 73-424

**ELIZABETH J. RUSSELL, individually and as representative of All Capital Investment Service customers,**

*Petitioner,*

vs.

**CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, a corporation,**

*Respondent.*

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

## BRIEF IN OPPOSITION

### QUESTIONS PRESENTED

The petition presents two questions, only the first of which was passed upon below.

(1) Whether petitioner has standing to maintain an action for damages for an alleged violation of §§ 16 and 21 of the Glass-Steagall Act (12 U.S.C., §§ 24 and 378).

(2) Whether the service provided by respondent Bank in managing separate accounts with brokerage houses in the name of each customer constituted a mutual investment fund in violation of the Glass-Steagall Act.

The case also presents the question, raised by respondent, but not decided by the courts below, whether the amount in controversy satisfies the $10,000 Federal jurisdictional requirement.

If respondent prevails on any one of these three issues, the judgment below must be affirmed.

## STATUTES INVOLVED

§§ 16 and 21 of the Glass-Steagall Act (12 U.S.C. §§ 24 and 378) are quoted at pp. 2-3 of the petition. 28 USC §1331(a) limits the jurisdiction of the district courts to civil actions wherein the matter exceeds $10,000 in value.

## STATEMENT OF THE CASE

In view of the inaccuracy and insufficiency of the Statement of the Case in the petition for certiorari, the facts are briefly restated here.

Beginning in 1968 and 1969 the respondent bank instituted and advertised a "Capital Investment Service", inaccurately described in the petition as a "fund". During the period here in question the Service operated as follows:

Each customer of the Capital Investment Service executed an agreement with the bank, which agreement specified in detail the rights and obligations of the respective parties. (The agreement executed by petitioner on April 3, 1969 appears at pages A20-24 of the Petition.) Under the terms of that agreement, each customer authorized the bank

to open a separate brokerage account for that customer with a specific brokerage house (in plaintiff's instance the broker is and has been Merrill Lynch, Pierce, Fenner & Smith.) Each such brokerage account was in the name of the individual customer. The customer paid the brokerage fees and the bank merely acted as an agent in selecting investments for each customer's account. Securities were bought, sold, and held without commingling for each account on behalf of the individual customer who owned the account, although it was understood that the bank might buy or sell the same securities at the same time for all accounts.* Dividends and interest received upon such securities belong to the individual customer, and are, at the customer's option, either distributed to him or reinvested for his account.**

The customer or the bank was and is free to terminate the arrangement at any time. The contract provided (Pet. A23):

> "Upon termination of this agreement, Merrill Lynch, Pierce, Fenner & Smith will continue to hold the securities and cash in the account which I [petitioner]

---

* The brochure advertising the Service (Exhibit 1 to plaintiff's memorandum opposing defendant's motion to dismiss, App. below p. 111) stated, *inter alia*:

> "We maintain a standard portfolio of stocks for all the investors who choose our Capital Investment Service. Securities are purchased or sold at the same time for all accounts, without consideration by us of federal tax or other individual circumstances of investors. In this way we keep our cost to a minimum and are able to offer our advising services to persons with as little as $20,000 to invest."

** Since May 12, 1970, customers have selected their own investments and their own brokers; prior thereto the bank was empowered by the customer to exercise its own discretion as to investments and brokers, but since that date the bank's Service has been advisory only. (App. below, pp. 13, 37, 41).

> have established with them, but all of your [bank's] rights and obligations as agent for the investment of the account shall terminate."

Thus, in the event of such termination, the cash and securities in the customer's brokerage account remain with the broker in that account, until such time as the customer instructs the broker otherwise as to further handling of the account.

Petitioner delivered $20,000 to the bank for investment pursuant to the above arrangement. (Pet. A-20.) Other persons similarly invested $7,500,000. (Pet. A-11.)

Petitioner's complaint alleged that Capital Investment Service constituted a "mutual investment fund" in violation of the provisions of the Glass-Steagall Act as construed by this Court in *Investment Company Institute* v. *Camp,* 401 U.S. 617 (1971), decided shortly before the complaint was filed. The complaint also alleged that the Service invested customer funds in Penn Central stock, *inter alia,* including 45 shares costing $2,464.81 bought for petitioner, that this stock declined drastically in value (Pet. A-12), and that the bank's investments in all securities for the customers of its Capital Investment Service had declined in value by approximately $2,000,000 (Pet. A-14), or approximately 27% of the total. If the petitioner's loss was proportionately the same, it would have amounted to 27% of $20,000, or $5,400. Thus, whether measured by petitioner's loss in Penn Central, or by the general decline in all of petitioner's investment, petitioner's loss was substantially under the $10,000 jurisdictional amount.

Plaintiff makes no claim of mismanagement of funds; indeed, as the court below pointed out (Pet. A-3),

plaintiff "expressly disavowed any theory of recovery except her claim that §§ 16 and 21 of the Glass-Steagall Act have been violated". (See App. below, p. 77.) Thus no issue as to mismanagement of funds is presented.

Respondent moved to dismiss the complaint (App. below, pp. 64-66) upon three grounds, any one of which would have been sufficient:

1. There is no private right of action for damages arising from violation of the Glass-Steagall Act.

2. On the undisputed facts, respondent's Capital Investment Service did not constitute a mutual fund and therefore did not violate that Act.

3. The amount in controversy was insufficient to satisfy the jurisdictional minimum of $10,000.

The District Court granted the motion to dismiss on the ground that plaintiff was not within the class of those within the statutory purpose "that Congress sought to protect." (App. below, pp. 125-126.) The Court of Appeals affirmed on the same ground.

## ARGUMENT

This case presents no conflict of decisions or novel question of importance, but an application by the courts below of principles as to standing long recognized in the decisions of this Court. In addition, it is clear as a matter of law that the complaint was dismissible because the amount involved was insufficient to satisfy Federal jurisdictional requirements and because of lack of substantive merit apart from the matter of standing.

1. The court below properly held that the participants in the Service were not members of the class for whose benefit the Glass-Steagall provisions in issue here were enacted, and that "to allow them to recover damages resulting from nothing more than a decline in value of a prudently managed fund simply because the fund itself was created or operated in violation of §§ 16 and 21 of the Glass-Steagall Act would impair the precise interests that the statute was enacted to protect." * (Pet. A-7.)

This principle, enunciated years ago in *Texas & Pacific Ry. Co.* v. *Rigsby*, 241 U.S. 33 (1916), has been recognized in the recent decisions holding that standing requires both that there be "injury in fact" and that the injury affect "an interest arguably within the zone of interests to be protected or regulated" by the statute claimed to have been violated. *United States* v. *Students Challenging Reg-*

* To allow recovery of the entire amount invested by all participants in Continental's Capital Investment Service, as prayed in the complaint, would be even more unjustifiably harmful to the interests of bank depositors and stockholders.

*ulatory Agency Procedures,* 93 S. Ct. 2405, 2415 (1973); *Sierra Club* v. *Morton,* 405 U.S. 727, 733 (1972); *Data Processing Service* v. *Camp,* 397 U.S. 150, 153 (1970).

The Glass-Steagall restrictions on banks did not reflect a concern that banks could not capably provide the same type of service as mutual funds or that the customers of such services needed special protection from such activities, but a design not to jeopardize the overriding interest of bank depositors and the public in preserving the solvency of the banks themselves. (See opinion below, A5-A6 and excerpts from *Investment Company Institute* v. *Camp,* 401 U.S. 617, quoted therein.) Here there is no claim that petitioner's investment losses were a result of the fact that her investments were administered by a bank.

Moreover, with particular respect to the National Banking Act, "it has been held repeatedly by this court that where the provisions of the national banking act prohibit certain acts by banks or their officers, without imposing any penalty or forfeiture applicable to particular transactions which have been executed, their validity can be questioned only by the United States, and not by private parties. *National Bank* v. *Matthews,* 98 U.S. 621; *National Bank* v. *Whitney,* 103 U.S. 99; *National Bank of Xenia* v. *Stewart,* 107 U.S. 676." *Thompson* v. *St. Nicholas National Bank,* 146 U.S. 240, 251 (1892). And more recent decisions have similarly interpreted the Glass-Steagall Act as not "indicating an intention to depart from the principle of those cases, or to make such transactions subject to attack by persons other than the Government." *Noel Estate, Inc.* v. *Commercial National Bank in Shreveport,* 232 F.2d 483, 485 (5th Cir. 1956); *Blaney* v. *Florida National Bank at Orlando,* 357 F. 2d 27 (5th Cir. 1966). Thus a private litigant may not collect damages from a bank mere-

ly because it has acted *ultra vires*. This serves the salutary purpose of protecting the bank and its depositors against claims, such as petitioner's, in which the injury asserted did not result from the fact that the bank was acting beyond its powers.

The *Investment Company* and *Data Processing* cases, as well as *Arnold Tours* v. *Camp*, 400 U.S. 45 (1970), do not hold that private persons have standing to sue national banks for injuries resulting from the bank's supposed violations of the National Banking Act. Those cases hold only that private persons in competition with national banks, aggrieved by administrative regulations expansively interpreting the powers of national banks, have standing under the Administrative Procedure Act to challenge the administrative regulations which authorized national banks to compete with them and thereby caused them injury.

The position of petitioner here is not comparable, both because she is not among those intended to be protected and because, in contrast to the competitor cases, no injury attributable to the statutory violation can be shown. And this private suit for damages cannot and, of course, does not rest upon the Administrative Procedure Act.

2. There is no substance to petitioner's claim that the service performed by the bank here is the equivalent of a mutual investment fund, found unauthorized in the *Investment Company* case. The controlling fact there was that the investors received certificates of ownership (which in substance were found to be securities) in a single commingled fund administered by the bank. These certificates represented units which were transferable in themselves and separate from the underlying securities purchased by the fund. The underlying securities were not owned by the

individual investors. In this case, however, there is no commingling of funds or accounts. Each investor owns the securities held in a separate account by the brokerage house for him. He may terminate the management agreement at any time, and if he does, the brokerage account and the securities in it still belong to him.

The investor thus does not own a proportionate share of a common pooled fund, which was a principal factor causing the arrangement in the *Investment Company* case to be treated as a mutual fund. The fact that respondent bank here purchases securities of the same issue simultaneously for a number of separate accounts owned by different investors does not show that the investors are buying securities in a single fund. Indeed, the *Investment Company* opinion makes clear that for a bank merely "to act as a managing agent for individual customers, or to purchase stock for the account of its customers" is not unlawful. (401 U.S. at 625.)

The complaint here, filed 18 days after this Court's decision in the *Investment Company* case, obviously is premised on the erroneous belief that that decision invalidates respondent's Capital Investment Service. In view of the absence of factors critical to the *Investment Company* decision, it is clear that, apart from the question of standing, petitioner has no case on the merits.

3. Petitioner's alleged loss from the decline in value of the securities in her account was approximately $5,400, which is substantially less than the $10,000 jurisdictional amount. The complaint does not allege that any other member of the class lost a larger amount.* And she cannot aggregate the alleged amount of injury to the members of

---

* Hence the issue before this Court in *Zahn* v. *International Paper Company*, certiorari granted, 410 U.S. 925, is not here presented.

the class. *Snyder* v. *Harris*, 394 U.S. 332 (1969). Since the required jurisdictional amount was clearly lacking, the complaint was dismissible for that reason also.

## CONCLUSION

Since no good reason for granting certiorari has been shown, the petition should be denied.

Respectfully submitted,

ROBERT L. STERN
BRYSON P. BURNHAM
231 South La Salle Street
Chicago, Illinois 60604
*Attorney for Respondent.*

MAYER, BROWN AND PLATT
231 South LaSalle St.
Chicago, Illinois 60604

LIBRARY
SUPREME COURT, U. S.

FILED
OCT 13 1973
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1973.

**No. 73-424**

ELIZABETH J. RUSSELL, INDIVIDUALLY AND AS REPRESENTATIVE OF ALL CAPITAL INVESTMENT SERVICE CUSTOMERS,
*Petitioner,*

*vs.*

CONTINENTAL ILLINOIS NATIONAL BANK & TRUST COMPANY OF CHICAGO, A CORPORATION,
*Respondent.*

## REPLY BRIEF FOR PETITIONER.

MAURICE JAMES MORIARTY,
ROBERT C. HULTQUIST,
JOSEPH M. LADD,
Suite 2400,
150 North Wacker Drive,
Chicago, Illinois 60606,
*Attorneys for Petitioner.*

Gunthorp-Warren Printing Company, Chicago • 346-1717

## INDEX.


| | PAGE |
|---|---|
| Argument | 1 |
| I. Mrs. Russell Has Standing to Invoke the Glass-Steagall Act by Her Status as Depositor of the Bank | 1 |
| II. Mrs. Russell Has Standing to Invoke the Glass-Steagall Act as Customer of the Bank's Fund Because She Has Suffered Economic Injury by the Bank's Violation of That Act | 3 |
| III. Challenge to Agency Action Is Not Prerequisite for Standing Where No Appropriate Agency Has Acted | 4 |
| IV. The Complaint Alleges Sufficient Facts to Establish That the Bank's Fund Is in Violation of the Glass-Steagall Act | 6 |
| V. The Complaint Alleges an Amount in Controversy Exceeding the Jurisdictional Minimum | 9 |
| Conclusion | 11 |

CITATIONS.

*Cases.*

Air Reduction Co. v. Hickel, 420 F. 2d 592 (D. C. Cir. 1969) ..... 4

Arnold Tours, Inc. v. Camp, 400 U. S. 45 (1970) ..... 4

Barlow v. Collins, 397 U. S. 159 (1970) ..... 3

Data Processing Service v. Camp, 397 U. S. 150 (1970) .. 3-4

Gonzalez v. Freeman, 334 F. 2d 570 (D. C. Cir. 1964) .. 3

Investment Company Institute v. Camp, 401 U. S. 617 (1971) .....2-6, 8-9

Office of Communication of United Church of Christ v. FCC, 359 F. 2d 994 (D. C. Cir. 1966) ..... 3

Rosado v. Wyman, 397 U. S. 397 (1970) ..... 5

Scanwell Laboratories, Inc. v. Shaffer, 424 F. 2d 859 (D. C. Cir. 1970) ..... 4

St. Paul Indemnity Co. v. Red Cab Co., 303 U. S. 283 (1937) ..... 9

Tennessee Electric Power Co. v. TVA, 306 U. S. 118 (1939) ..... 3

*United States Statutory Provisions*, 12 U. S. C. §§ 24 and 378 .....1-2, 5, 7, 9-10

*Miscellaneous.*

12 C. F. R. 1.9 (1971) ..... 5

75 Cong. Rec. 9914 (1932) .. ..... 2

Davis, *The Liberalized Law of Standing*, 37 U. Chi. L. R., 450 (1970) ..... 3-5

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1973.

No. 73-424.

ELIZABETH J. RUSSELL, INDIVIDUALLY AND AS REPRESENTATIVE OF ALL CAPITAL INVESTMENT SERVICE CUSTOMERS,
*Petitioner,*

*vs.*

CONTINENTAL ILLINOIS NATIONAL BANK & TRUST COMPANY OF CHICAGO, A CORPORATION,
*Respondent.*

## REPLY BRIEF FOR PETITIONER.

## ARGUMENT.

The petitioner controverts points raised by the respondent's Brief in Opposition. For clarity of reference, the petitioner is called "Mrs. Russell," respondent is "the bank" and the bank's Capital Investment Service is "the fund".

### I.

### MRS. RUSSELL HAS STANDING TO INVOKE THE GLASS-STEAGALL ACT BY HER STATUS AS DEPOSITOR OF THE BANK.

The bank says it is not sufficient for Mrs. Russell to show economic injury from a violation of the Glass-Steagall Act; she must also display some "interest" which Congress intended to protect by that law. The bank apparently concedes that

Mrs. Russell sustained economic injury by the investment of $20,000.00, part of which was unquestionably lost by the fund's ill-fated venture into the Penn Central fiasco. The bank argues only that Mrs. Russell's participation in the entity which she claims is illegal removes her from the legions of the just which Congress sought to protect by the Glass-Steagall Act.

Both the bank and the appellate court below chose to ignore the fact that Mrs. Russell was an ordinary savings and checking account customer of the bank at all times material to this lawsuit. Mrs. Russell established this fact by her affidavit (Appendix below 106 and 110) as she had a perfect right to do in opposition to the bank's "speaking" motion to dismiss which went beyond the allegations of the complaint. The fact that Mrs. Russell is a bank depositor brings her squarely within the group of persons which the Glass-Steagall Act sought to protect. In 75 Cong. Rec. 9914 (1932) Senator Bulkley, a proponent of § 16, stated during Senate floor debates, ". . . the measure as a whole is in all of its fiber intended as a protection for depositors." Even the appellate court below (Petition A5) conceded " . . . we may assume also that the interest of depositors . . . may be sufficient to support" a suit similar to *Investment Company Institute* v. *Camp*, 401 U. S. 617 (1971).

In its arguments before the trial court and the appellate court below the bank presented affidavits and exhibits which went far beyond the allegations of the complaint in an attempt to show as a factual matter that its fund was not like the fund outlawed in *Investment Company Institute* v. *Camp*. Since the appellate court entertained these extraneous exhibits and arguments its refusal to consider Mrs. Russell's status as a depositor in determining the question of standing was unfair and erroneous. This is especially true because Mrs. Russell sues "individually" as well as a representative of other fund customers; it is Mrs. Russell's standing as an individual which is the issue here, not her qualifications to represent other members of a class.

## II.

**MRS. RUSSELL HAS STANDING TO INVOKE THE GLASS-STEAGALL ACT AS CUSTOMER OF THE BANK'S FUND BECAUSE SHE HAS SUFFERED ECONOMIC INJURY BY THE BANK'S VIOLATION OF THAT ACT.**

Even if Mrs. Russell's status as a depositor is disregarded, the bank's promulgation of the "zone of interest to be protected or regulated" test is not necessarily a correct statement of the current law. In any case it is in no wise binding on this Court.

Mrs. Russell's complaint alleges that she deposited $20,000.00 in the bank's fund. This is not disputed; nor is it disputed that Mrs. Russell's $20,000.00 was never refunded her. Moreover, the bank strenuously argues—for other purposes, to be sure—that Mrs. Russell has suffered diminuition in her deposit in an amount of at least $5,400.00. The bank does not and cannot deny that this constitutes "injury in fact" for the purposes of standing.

If such "injury in fact" does not confer standing to challenge violation of a federal statute, it should. This Court has moved a long way from the "legal interest" test of *Tennessee Electric Power Co.* v. *TVA*, 306 U. S. 118 (1939). This movement is clearly in the direction of establishing "injury in fact, economic or otherwise," as the sole criterion of standing. The dissenting and concurring opinion of Mr. Justice Brennan in *Data Processing Service* v. *Camp*, 397 U. S. 150 (1970) and *Barlow* v. *Collins*, 397 U. S. 159, 167 (1970), joined in by Mr. Justice White, shows that at least two members of this Court have adopted that position already. Two lower court opinions written by Judge Berger before his appointment as Chief Justice Berger indicate that he may share their views. See *Gonzales* v. *Freeman*, 334 F. 2d 570, 575 (D. C. Cir. 1964) and *Office of Communication of the United Church of Christ* v. *FCC*, 359 F. 2d 994, 1002 (D. C. Cir. 1966).

The "zone of interest" test espoused by the bank has come under serious criticism from sources outside this Court. Kenneth Culp Davis argues vigorously that this test is analytically faulty, contrary to much existing case law and cumbersome in that it necessarily involves an unwieldly search for legislative intent which may not exist and is generally not clearly expressed. See Davis, *The Liberalized Law of Standing*, 37 U. Chi. L. Rev. 450 (1970). These sentiments have been echoed in numerous federal appellate court opinions including those by Judge Tamm in *Scanwell Laboratories* v. *Shaffer*, 424 F. 2d 859 (D. C. Cir. 1970), and Judge Leventhall in *Air Reduction Co.* v. *Hickel*, 420 F. 2d 592, 594 (D. C. Cir. 1969), both discussed by Professor Davis.

It is Mrs. Russell's position that the "injury in fact" test is the proper standard for determining the standing of a litigant to raise a question of violation of a federal statute. Mrs. Russell comes squarely within the parameters of this test.

## III.

## CHALLENGE TO AGENCY ACTION IS NOT A PREREQUISITE FOR STANDING WHERE NO APPROPRIATE AGENCY HAS ACTED.

The bank argues that private litigants have no standing to allege violations of the National Banking Act without specific remedial legislation. *Investment Company Institute* v. *Camp* and *Data Processing Service Organizations* v. *Camp*, as well as *Arnold Tours, Inc.* v. *Camp*, 400 U. S. 45 (1970) are signposts which mark a clear trend in the opposite direction of recognizing a private right of action where the Comptroller of Currency, charged with enforcing the National Banking Act, does so improperly. The bank tries to distinguish these cases by pointing out that Mrs. Russell is not challenging an illegal action of the Comptroller. What the bank does not point out is that no ruling on the legality of its fund was ever sought

or given, and that consequently the Comptroller did nothing for Mrs. Russell to challenge. Nor does the bank point out that no machinery exists whereby Mrs. Russell could initiate the Comptroller's examination and ruling. 12 C. F. R. 1.9 (1971) provides that "any *bank* may request the Comptroller of Currency to rule on the application of this part, or Par. 7 of 12 U. S. C. 24 . . ." [containing § 16 of the Glass-Steagall Act]. The individual fund customer or depositor in the bank can rely on no corresponding provision.

This Court has recognized that where no administrative remedy to agency action is afforded, it is draconian to insist on "exhaustion of remedies" as a prerequisite to judicial review of that action. *Rosado* v. *Wyman*, 397 U. S. 397 (1970). The present case is clearly parallel: the bank would deny Mrs. Russell's standing because she failed to challenge a non-existent ruling which could only be initiated by the bank. It makes no jurisdictional sense to allow the bank to distinguish *Investment Company Institute* v. *Camp* and the other cases cited above because of its own failure to obtain a ruling from the Comptroller on the propriety of its fund.

Professor Davis suggests and Mrs. Russell agrees that the law of standing in the federal courts has become a clumsy and unnecessarily arcane catchall of fine distinctions drawn with no regard to real differences, too often used to eliminate lawsuits which ought to be eliminated for other reasons, such as ripeness, mismanagement or because they involve political questions. See Davis, *The Liberalized Law of Standing*, 37 U. Chi. L. Rev. 469-470. Professor Davis summarizes his argument as a rhetorical but very relevant question:

> The natural system is that of the common law: If A and B are private parties and A hurts B, B has standing to get a determination of the legality of A's action. Why should not the law be the same, whether A is the government, an agency, an officer, or a private party, and whether the injury is to B's person, his physical property, or his intangible interests? Is not the natural system the simple

one that injury in fact is enough for standing? 37 U. Chi. L. Rev. 468.

## IV.

## THE COMPLAINT ALLEGES SUFFICIENT FACTS TO ESTABLISH THAT THE BANK'S FUND IS IN VIOLATION OF THE GLASS-STEAGALL ACT.

The merits of this case are not properly before the Court since the trial court ruled only on the issue of standing, and this alone was the narrow issue decided by the court of appeals below. (Petition A4.) Nevertheless, the bank attempts to distinguish its fund from the open-end investment account condemned in *Investment Company Institute* v. *Camp* on the basis of its relationship with Merrill Lynch, Pierce, Fenner & Smith. The bank points out that a customer contract (Petition A20) requires each fund customer to maintain at Merrill Lynch a separate account holding the securities purchased for him or her. When the customer elects to withdraw from the fund, he may keep securities in his Merrill Lynch account as an alternative to a cash payout. Because of this separation of accounts and the option to terminate in kind as well as in cash, the bank maintains there is no comingling of customer funds. The bank admits that a single investment decision might affect all customer accounts, but argues that this is a normal incident of any investment program which serves more than one customer.

The bank's argument completely ignores the uniformity of purpose and function arising from the program's commitment to a standardized portfolio for each investor. This commitment led to regimentation. The bank administered all customer accounts in exactly the same way in accordance with a preconceived investment policy. Every account was subordinated to the "standard portfolio . . . without consideration . . . of federal tax or other individual circumstances of investors." (Petition A20-21). This standardization was achieved to a point of "substantially identical lists of stock in substantially

identical proportions" for all fund customers (Appendix below 40). The significance of separate customer accounts fades where all accounts are administered in the same way, and where each account receives the same securities as all others in proportion to its contribution. Under such circumstances all accounts are the equivalent of one common fund under the direction and control of the bank as common administrator. This is certainly the effect of commingling, if not the traditional form.

The bank urges in its brief (p. 3) that since May 12, 1970, they no longer administer the fund on a completely discretionary basis. This merely diverts attention from the issue. If the bank collected $7,500,000.00 in violation of the Glass-Steagall Act in the first instance, nothing that they could do subsequently by their unilateral action could validate the illegality.

This substantial identity of investments in proportion to contributions, which so characterize the bank's fund, undermines the argument that the fund was somehow different because the customer could elect to receive securities on termination rather than a prorata share of the common fund in cash. Since the substantial identity pervades all fund accounts, the securities held in any given account *are* its owner's prorata share of the whole at any given time. To illustrate, suppose five men contribute $100.00 in equal shares to buy 100 shares of stock from issue "A" and another $100.00 to buy 1 share of stock from issue "B". If one contributor withdraws 20 shares from issue "A" he has received his pro-rata share as much as if he were paid $20.00 for his 20% interest in issue "B". The *form* in which the customer's proportionate interest is redeemable is not significant; what is important is that the customer has the right to demand his pro-rata share at any given time. Free redeemability is the hallmark of a mutual fund, not free redeemability *in cash*, and free redeemability is specifically afforded by paragraph 18 of the fund customer from contract (Petition A23).

Finally, because of its almost symbiotic relationship with the bank Merrill Lynch was not an independent broker acting in the interest of customers who merely receive the advisory services of the bank. In the first place, the contract signed by each fund subscriber took from him any semblance of control over "his broker" short of termination. Paragraph 8 provides that the bank "will have the sole power to instruct Merrill Lynch concerning the investment of my account, and I will not instruct them regarding such investment." (Petition A21.) Second, Merrill Lynch had a special interest in doing only and exactly what the bank ordered. Paragraph 7 of the contract requires the fund customer to pay Merrill Lynch for each transaction dictated by the bank at the "standard rate," and the bank used Merrill Lynch for at least 99% of all fund transactions (Appendix below 41). The bank has not revealed the net sum paid annually to Merrill Lynch from fund transactions carried on through it; however, the bank has admitted that the total fund contributions exceed $7,500,000.00, and it is safe to hazard that the commissions on this sum are substantial. This community of interest between the bank and Merrill Lynch is not unique to the bank's fund, but grows out of a well established pre-existing business relationship. The bank disclosed that Merrill Lynch is a depositor, a borrowing customer and that Merrill Lynch acts as the bank's broker, dealer or underwriter in bank transactions involving various kinds of securities (Appendix below 42).

Given the almost total autonomy afforded the bank by its customer contract, together with the substituting business relationship and community of interest between the bank and Merrill Lynch, Mrs. Russell questions whether the participation of Merrill Lynch in the program is not a distinction without a difference. *Investment Company Institute* v. *Camp* recognized inherent conflicts between the interests of the investment security banker with something to sell and those of a customer seeking impartial investment advice from his commercial banker. At 401 U. S. 633 this Court stated that "the banker who

has nothing to sell his depositors is much better qualified to advise disinterestedly and to regard diligently the safety of depositors. . . ." But does the "banker who has nothing to sell" mean the banker who directs the sale but carries it out through a *factotum?* Is the conflict between the promotional interest of the investment banker and the obligations of the commercial banker avoided by the investment banker's acting through a broker who has no function in the decision making and no stake in protecting the interest of the customer? Clearly the answer is no.

Assuming that Mrs. Russell can prove the allegations of her complaint, as one must for the purpose of a motion to dismiss, it must be concluded that the bank has set up an open-end investment fund of the sort prescribed by *Investment Company Institute* v. *Camp,* and that through the agency of Merrill Lynch the bank seeks indirectly to carry on investment security banking in violation of the clear congressional purpose embodied in the Glass-Steagall Act.

## V.

## THE COMPLAINT ALLEGES AN AMOUNT IN CONTROVERSY EXCEEDING THE JURISDICTIONAL MINIMUM.

Paragraph 7 of the complaint alleges that Mrs. Russell contributed $20,000.00 to the bank's fund (Petition A11), Paragraph 14 alleges that the fund is illegal (Petition A13) and the complaint prays as damages the return of all customer contributions to the fund including Mrs. Russell's. See paragraph 8 and prayer of the complaint (Petition A11 and A15). Even considering Mrs. Russell's claim alone, without aggregating those of other class members', the complaint clearly sets forth that an amount in excess of the jurisdictional minimum is being illegally held by the bank. Against this, the bank must show "from the face of the pleadings, . . . to a legal certainty, that the plaintiff cannot recover the amount claimed." *St. Paul Indemnity Co.* v. *Red Cab Co.,* 303 U. S. 283, 289 (1937).

After having specifically pointed out that "no issue as to mis-management" of funds is presented (Brief in Opposition 5), the bank specifically resurrects that issue by arguing that the real amount in controversy is the $5,400.00 which Mrs. Russell lost as a result of ill-favored fund investments. If at this stage there is no "issue as to mis-management," then there is no purpose in discussing the amount lost by mismanagement except to provide the bank with a red herring to distract the Court from the real gravaman of the complaint, namely, the return of monies, including Mrs. Russell's $20,000.00, solicited and invested by the bank in violation of the Glass-Steagall Act. To the extent that the mismanagement losses are relevant at all, they are relevant only to show that the danger of speculative investment arising from the combination of investment and commercial banking functions prohibited by the Glass-Steagall Act are real dangers which can still cause serious harm to customers and to the reputations of national banking associations. It was for this purpose only that they were mentioned in the complaint.

It should be noted in conclusion that although the issue was raised below, the trial court and the appellate court declined to dismiss the complaint for insufficiency of jurisdictional amount. Mrs. Russell suggests that if the lack of jurisdictional amount was so "clear" as the bank says, somebody in the courts below would have seen it.

## CONCLUSION.

On the strength of these arguments and the arguments set forth in the Petition the Court should grant a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

MAURICE JAMES MORIARTY,
ROBERT C. HULTQUIST,
JOSEPH M. LADD,
Suite 2400,
150 North Wacker Drive,
Chicago, Illinois 60606,
*Attorneys for Petitioner.*